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In The

Supreme Court of the United States

October Term, 1970

No. 1893 70-346

GEO. A. CLARK & SON, INC., a corporation,
Petitioner,

vs.

F. W. NOLD and HELEN A. NOLD,
Respondents.

PETITIONER'S REPLY BRIEF IN ANSWER TO RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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Petitioner in replying to Respondents' Brief would like to point out first some minor corrections. The *Finney* case (*Finney v. Knapp*, 145 Ga. 400, 89 S.E. 413 (1916)) has in effect been overruled. Second, Respondents argue on the final page of its brief that most of the cases cited by Petitioner were found by the South Dakota Supreme Court distinguishable in that none of them involved a purchaser of property for value from the trustee. But this matter has been argued by the Petitioner on page 10 of its brief (footnote 6), and no attempt has been made by Respondents to refute Petitioner's argument.

Chiefly, however, what the Respondents' Brief does is to highlight the question: Does the South Dakota Supreme Court have the authority in interpreting the Bankruptcy Act

to allow a purchaser of the bankrupt's assets from the trustee under a sale "subject to lien" to invalidate a lien when such action would be solely for the purchaser's benefit?

Petitioner's position is that the South Dakota Supreme Court does not have the right to make new bankruptcy rules and regulations and that the case of *Fischer v. Pauline Oil & Gas Co.*, 309 U.S. 294, 60 S.Ct. 535, 84 L.Ed. 764 (1940), cannot be enlarged by it to give it the authority. That the Supreme Court of South Dakota had no authority for allowing the purchaser who purchased the property from the trustee "subject to lien" to invalidate the lien where such action would be solely for the benefit of the purchaser. The pre-bankruptcy lien was valid unless invalidated by the special section of the Bankruptcy Act, and this section was passed solely in the interest of equitable distribution of assets to all creditors.

This is the position of the minority decision in the South Dakota Supreme Court which held:

> "We are told that it would be inequitable to hold in the circumstances of this case that respondents may not assert the provisions of #107, but we are not given any reasons why it would be inequitable to so hold. The fact that such a holding would have the effect of preferring appellant as a creditor of the bankrupt should not be of any legitimate concern to respondents as purchasers. Respondents do not claim that they are attempting to vindicate the rights of other creditors of the bankrupt. Indeed it does not appear that they could validly make such a claim." (Appendix p. 40.)

Collier points out, also:

> "Nor can a purchaser of the bankrupt's assets require the trustee to proceed with a suit to recover a preference for the purchaser's benefit." *Collier on Bankruptcy*, Vol.

3, p. 1093. See *Grass v. Osborn* (C.C.A. 9th Cir.), 16 Am.B.R. (N.S.) 13, 39 F.2d 461.

Wherefore it is submitted again that the petition for writ of certiorari be granted.

Respectfully submitted,

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